Supreme Court, U. S.
FILED
NOV 24 1980
MICHAEL RODAK, JR., CLERK

80-857

No. Misc.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

PATRICIA McQUEENEY,
*Petitioner,*

v.

MAX GLENN, as an individual and as Superintendent of the Greenfield-Central School Corporation, and GREENFIELD-CENTRAL COMMUNITY SCHOOL CORPORATION,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Donald F. Foley
Tony H. Abbott
YAEGER, FOLEY & CUTTER
620 Union Federal Building
Indianapolis, Indiana 46204
317-639-5633
*Attorneys for Petitioner*

Central Publishing Company, Inc., Indianapolis, IN 46206

## QUESTIONS PRESENTED ON REVIEW

I. WHETHER, UNDER INDIANA LAW, A NON-CERTIFIED PUBLIC EMPLOYEE HAS A LEGITIMATE CLAIM OF ENTITLEMENT TO CONTINUED EMPLOYMENT WHEN DISCHARGED IN VIOLATION OF DISCHARGE PROCEDURES WHICH HAD BEEN CONSISTENTLY UTILIZED WITH NON-CERTIFIED EMPLOYEES FOR THE PREVIOUS ELEVEN YEARS PRIOR TO DISCHARGE.

II. WHETHER THE DISCHARGE OF A PUBLIC EMPLOYEE IN RETALIATION FOR HER HUSBAND'S EXERCISE OF FREE SPEECH CONSTITUTES ARBITRARY AND CAPRICIOUS CONDUCT BY THE PUBLIC EMPLOYER.

III. WHETHER A PUBLIC EMPLOYEE, WHO HAS PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT HER DISCHARGE WAS PARTIALLY MOTIVATED BY CONSTITUTIONALLY IMPERMISSIBLE CONSIDERATIONS, HAS THE BURDEN TO PROVE THAT SHE WOULD NOT HAVE BEEN DISCHARGED BUT FOR SUCH CONSTITUTIONALLY IMPERMISSIBLE CONSIDERATIONS.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED FOR REVIEW ..... | i |
| TABLE OF CONTENTS ..... | iii |
| TABLE OF AUTHORITIES ..... | v |
| OFFICIAL CITATION OF THE OPINION OF THE INDIANA COURT OF APPEALS ... | vi |
| JURISDICTION ..... | 1 |
| CONSTITUTIONAL AND STAUTORY PROVISIONS ..... | 2 |
| STATEMENT OF THE CASE ..... | 3 |
| ARGUMENT ..... | 8 |
| I. WHETHER, UNDER INDIANA LAW, A NON-CERTIFIED PUBLIC EMPLOYEE HAS A LEGITIMATE CLAIM OF ENTITLEMENT TO CONTINUED EMPLOYMENT WHEN DISCHARGED IN VIOLATION OF DISCHARGE PROCEDURES WHICH HAD BEEN CONSISTENTLY UTILIZED WITH NON-CERTIFIED EMPLOYEES FOR THE PREVIOUS ELEVEN YEARS PRIOR TO DISCHARGE ..... | 8 |
| II. WHETHER THE DISCHARGE OF A PUBLIC EMPLOYEE IN RETALIATION FOR HER HUSBAND'S EXERCISE OF FREE SPEECH CONSTITUTES ARBITRARY AND CAPRICIOUS CONDUCT BY THE PUBLIC EMPLOYER ..... | 11 |
| III. WHETHER A PUBLIC EMPLOYEE, WHO HAS PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT HER DIS- | |




PREVIOUS PAGE WAS BLANK

## TABLE OF CONTENTS—Continued


Page

CHARGE WAS PARTIALLY MOTIVATED BY CONSTITUTIONALLY IMPERMISSIBLE CONSIDERATIONS, HAS THE BURDEN TO PROVE THAT SHE WOULD NOT HAVE BEEN DISCHARGED BUT FOR SUCH CONSTITUTIONALLY IMPERMISSIBLE CONSIDERATIONS ..... 13

CONCLUSION ..... 14

APPENDIX "A"
SECOND AMENDED COMPLAINT FOR AN INJUNCTION AND DAMAGES ..... A-1

APPENDIX "B"
COURT'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT DENYING INJUNCTION ..... A-8

APPENDIX "C"
PETITIONER'S MOTION TO CORRECT ERRORS ..... A-20

APPENDIX "D"
OPINION OF COURT OF APPEALS OF INDIANA, FIRST DISTRICT ..... A-27

APPENDIX "E"
PETITIONER'S PETITION FOR HEARING ..... A-37
DENIAL OF PETITION FOR REHEARING .... A-37

APPENDIX "F"
PETITIONER'S PETITION FOR TRANSFER A-43
DENIAL OF PETITION TO TRANSFER ..... A-43

## TABLE OF AUTHORITIES


CASES: Page

*Bishop v. Wood*, 426 U.S. 341, 48 L.Ed.2d 684, 96 S.Ct. 2074 (1976) ..... 8

*Clark Realty, Inc. v. Clarke*, ____ Ind.App.____, 354 N.E.2d 779 (1976)..... 10

*Elrod v. Burns*, 127 U.S. 347, 49 L.Ed.2d 547, 96 S.Ct. 2673 (1976) ..... 12

*Harris v. Town of Speedway*, 169 Ind.App. 100, 346 N.E.2d 646 (1976).....8, 10

*Hayes v. Cape Henlopen School District*, 341 F.Supp. 828 (D.Del. 1972)..... 11

*Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 50 L.Ed.2d 471 92 S.Ct. 568 (1977) ..... 13

*Perry v. Sindermann*, 408 U.S. 593, 33 L.E.2d 570, 92 S.Ct. 2694 (1972) .....8, 10, 11

*State ex rel. Warzyniak v. Grenchik*, ____ Ind.App. ____, 379 N.E.2d 997 (1978)..... 9

*Villiage of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 50 L.Ed.2d 450, 97 S.Ct. 555 (1977) ..... 13

STATUTES AND CONSTITUTIONAL PROVISIONS:

Constitution of the United States of America Amendment I (1789) ..... 2

Constitution of the United States of America Amendment XIV, §1 (1868)..... 2

28 U.S.C. §1257(3) ..... 2

42 U.S.C. §1983 ..... 2, 3, 6, 14

OFFICIAL CITATION OF OPINION OF THE INDIANA COURT OF APPEALS

*Patricia McQueeney v. Max Glenn, et al.*, ____ Ind.App. ____, 400 N.E.2d 806 (1980).

No. Misc.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

PATRICIA McQUEENEY,
*Petitioner,*

v.

MAX GLENN, as an individual and as Superintendent of the Greenfield-Central School Corporation, and GREENFIELD-CENTRAL COMMUNITY SCHOOL CORPORATION,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

## JURISDICTION

Petitioner, Patricia McQueeney, requests this Court to grant certiorari to review a judgment entered by the Hancock Circuit Court, Special Judge Wesley W. Ratliff, Jr., on October 19, 1978. The trial court's judgment was affirmed by written decision of the Indiana Court of Appeals on February 19, 1980. The Indiana Court of Appeals entered an Order denying Petitioner's Petition for Rehearing on March 24, 1980. Petitioner's Petition for Transfer was denied by an Order of the Indiana Supreme Court on August 28, 1980.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3) and in accordance with this Court's Rule 19(1)(a). Petitioner respectfully submits that a federal question of substance has been decided by the highest court of the State of Indiana in a manner contrary to the applicable decisions of this Court, and that, in so doing, Petitioner's right to substantive due process as guaranteed by the Fourteenth Amendment of the Constitution of the United States and preserved in the Civil Rights Act of 1871 at 42 U.S.C. §1983 has been violated.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Constitution of the United States of America, Amendment I (1789) provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

2. The Constitution of the United States of America, Amendment XIV, §1 (1868) provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. *No state shall* make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state *deprive any person of* life, liberty, or *property, without due process of law*; nor deny to any persons within its jurisdictions equal protection of the laws." (Emphasis Added)

3. 28 U.S.C. §1257(3) provides:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 656, 62 Stat. 929."

4. 42 U.S.C. §1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. April 20, 1871, c. 22, §1, 17 Stat. 13."

## STATEMENT OF THE CASE

The Petitioner was hired by the Greenfield-Central Community School Corporation (hereinafter referred to as "Greenfield-Central") on January 3, 1971. She worked in the capacity of general office secretary at the central office of Greenfield-Central until she was discharged on March 3, 1978. Petitioner worked in the same office with the Superintendent of Greenfield-Central during her seven years of employment. The two persons who served in the capacity of Superintendent immediately prior to the Respondent, Max Glenn, testified for the Petitioner at the trial. They both testified that the Petitioner was a pleasant, competent, and efficient employee. She was described as an excellent employee. Max Glenn admitted that Mrs. McQueeney performed her work adequately.

Max Glenn was appointed as Superintendent in July of 1975. Mr. Glenn and the Petitioner worked together during

the fall of 1975 with no serious difficulties. In September of 1976, Petitioner's husband, Jack McQueeney, filed an application to run for a position as a member of the School Board of Greenfield-Central. Mr. McQueeney was supported by the Teachers' Association and other civic groups who had opposed Superintendent Glenn's policies. Mr. McQueeney was elected to the School Board in November of 1976; he became an acting member of the Board on July 1, 1977. From September 1977 through March 3, 1978, Mr. McQueeney, as a member of the School Board, privately and publicly criticized the policies and performance of Respondent Glenn as Superintendent of Greenfield-Central.

After Mr. McQueeney began to make such criticisms of the Respondent Glenn, Mr. Glenn assigned much of Mrs. McQueeney's work to others; he hired extra labor to do work that Mrs. McQueeney had previously performed. The relationship between Max Glenn and the Petitioner, Mrs. McQueeney, became progressively worse to the extent that during the period of several months prior to the discharge, Mr. Glenn ignored the Petitioner when she was in his presence, he displayed hostility towards her and severed all communications with the Petitioner seven months prior to her discharge.

Respondent Glenn claimed that it was a conflict of interest for Petitioner to be employed as a non-certified secretary in the central office, while her husband was a School Board member. Yet for years, the Respondent, Greenfield-Central, had allowed husbands and wives to be employed when one was in an administrative or elective position and the other a non-certified position.

In the fall of 1977, the central office employees, including the Petitioner, signed and circulated a petition in opposition to Respondent Glenn's hiring of extra labor; the petition claimed that Respondent Glenn violated School Board policy by paying such extra labor more than the existing central office employees. Jack McQueeney raised

the issue in subsequent Board meetings and in the press; Mr. McQueeney sided with the authors of the petition. Prior to the discharge of Mrs. McQueeney, Max Glenn attempted to transfer her from her job as a general office secretary to a position of assistant librarian, which position involved lesser responsibilities, benefits and wages.

Prior to January 1, 1978, Respondent Glenn notified all School Board members of executive meetings. Beginning in January 1978, Mr. Glenn stopped notifying Mr. McQueeney of such executive School Board meetings, and delegated that task to his secretary.

Petitioner, as a non-certified employee, did not have a written contract of employment with Greenfield-Central. However, Greenfield-Central had established specific procedures for discharge of non-certified employees by past practice which had been followed by Greenfield-Central for eleven years before March 3, 1978. During that period of time, Greenfield-Central provided employees with a conference with an administrator or principal of the school system. At that conference, the employee would be provided a period of time to correct such deficiencies (usually thirty days). If the deficiencies in the employee's work performance were not corrected within the specified period of time, then the employee was given the option to resign or have the question of the employee's discharge presented to the School Board for action.

This past practice had been followed by Respondent Glenn from the beginning of his tenure until March 3, 1978. The past practice for discharge of non-certified employees had not been changed or modified by any action of the Greenfield-Central School Board. However, the past practice concerning discharge was *not* followed in the matter of the discharge of the Petitioner.

In February, 1978 Respondent Glenn caused to be placed in a local Greenfield newspaper an advertisement for a

secretarial job opening; such advertisement described the same duties as found in Petitioner's job description entitled "General Office Secretary". On March 2, 1978, Jack McQueeney raised the question of hiring new personnel without School Board approval at a public School Board meeting; thereafter, the issue was raised by Jack McQueeney at a private "executive" School Board meeting. No action was taken by the School Board in either the public or private meeting to authorize the discharge of Petitioner. Respondent School Corporation's Policy Handbook requires that the Superintendent make a recommendation of discharge to the School Board preceding action by the School Board involving the discharge of employees. The Petitioner was discharged on March 3, 1978; she had no prior notice that she would be discharged. Petitioner was and is a citizen of the United States of America, and the Respondent, Greenfield-Central, is and was funded by State and Federal funds.

All of the above material facts are supported by and in large part taken from the "Findings of Fact" entered by the Hancock Circuit Court on October 19, 1978 (See, Appendix "B").

On March 17, 1978, the Petitioner filed a Complaint in the Hancock Circuit Court requesting a preliminary and permanent injunction to require the Respondent to reinstate her to her job as general office secretary in the central office of Greenfield-Central. Petitioner sought her reinstatement pursuant to 42 U.S.C. §1983 on the basis that her discharge was a violation of her constitutional right to substantive due process. On October 19, 1978, the trial court entered its "Court's Findings of Fact, Conclusions of Law and Judgment Denying Injunction". The trial court specifically concluded that Mr. McQueeney's criticism of Respondent Glenn "may have contributed to the decision to discharge the Plaintiff, but the Plaintiff did not prove by a preponderance of the evidence that she would not have been discharged had it not been for the statements of her

husband" (See, Appendix "B", Conclusion of Law No. 8). Further, the trial court found that the Petitioner was an employee at will and did not have a legitimate claim of entitlement to continued employment. Therefore, the trial court concluded that the Petitioner did not make her burden of proof, and her claim for reinstatement was denied.

The above conclusions were taken directly from the Conclusions of Law entered by the Hancock Circuit Court on October 19, 1978 (See, Appendix "B").

On December 18, 1978, the Petitioner filed with the trial court a Motion to Correct Errors, which motion specifically stated that the trial court committed error by failing to find that an implied contract was created by the specific practices of Greenfield-Central, by placing the burden of proof on the Petitioner to prove that she would not have been discharged had it not been for her husband's criticisms of Respondent Glenn, and by failing to find that Petitioner's constitutional right to substantive due process had been violated. (See, Appendix "C"). The Hancock Circuit Court denied the Petitioner's Motion to Correct Errors on January 5, 1979.

On February 19, 1980, the Court of Appeals of Indiana, First District, issued a written opinion affirming the decision of the Hancock Circuit Court (See, Appendix "D"). Petitioner filed a Petition for Rehearing on March 7, 1980 (See, Appendix "E"). Said Petition for Rehearing was denied by Order of the Court of Appeals of Indiana on March 24, 1980 (See, Appendix "E"). On April 11, 1980, the Petitioner filed a Petition for Transfer with the Indiana Supreme Court (See, Appendix "F"). Said Petition was denied by Order of the Indiana Supreme Court on August 28, 1980 (See, Appendix "F").

Throughout the appellate procedure, Petitioner preserved the federal question of her right to substantive due process, and it is this deprivation that she requests this Court to review by Writ of Certiorari.

## ARGUMENT

### I. WHETHER, UNDER INDIANA LAW, A NON-CERTIFIED PUBLIC EMPLOYEE HAS A LEGITIMATE CLAIM OF ENTITLEMENT TO CONTINUED EMPLOYMENT WHEN DISCHARGED IN VIOLATION OF DISCHARGE PROCEDURES WHICH HAD BEEN CONSISTENTLY UTILIZED WITH NON-CERTIFIED EMPLOYEES FOR ELEVEN YEARS PRIOR TO DISCHARGE.

In order to establish a violation of substantive due process, a discharged employee must have had a property interest in his job. Stated another way, the employee must have a "legitimate claim of entitlement to continued employment." *Perry v. Sindermann*, 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694 (1972). This claim of entitlement must be established by reference to state law. *Bishop v. Wood*, 426 U.S. 341, 48 L.Ed.2d 684, 96 S.Ct. 2074 (1976). A property interest in employment can be created by ordinance or by implied contract. Further, a claim of entitlement may arise from "the existence of rules and understandings, promulgated and fostered by state officials" or "the policies and practices of an institute." *Perry, supra*, at 603.

In Indiana, the controlling case with regard to public employees is *Harris v. Town of Speedway*, 169 Ind.App. 100, 346 N.E.2d 646 (1976). Harris, a probationary fireman, was discharged without benefit of the procedures contained in the "Rules and Regulations of the Speedway Fire Department". Harris alleged that the Rules and Regulations bestowed upon him a property interest in continued employment which could not be taken from him without full compliance with the procedures. The Court found that the Rules and Regulations "afforded 'any member' a hearing before being dismissed from service".

*Id.* at 650. The Court agreed that Harris possessed a legitimate claim of entitlement to continued employment:

> "So, by virtue of the right to a prior hearing bestowed on him by Speedway's Rules and Regulations, Harris was deprived of property interest (his 'legitimate claim of entitlement' to continued employment as a fireman) without a prior due process determination of his guilt." *Id.* at 652-653.

The case of *State ex rel. Warzyniak v. Grenchik*, ____ Ind.App. ____, 379 N.E.2d 997 (1978) adopted the *Harris* rationale. In *Grenchik*, the newly-installed mayor of the City of Whiting demoted numerous police officers of various positions to the rank of patrolman without specifying a cause for the demotions. No notice was given and no hearings were held prior to the demotions. A city ordinance permitted a police officer to be demoted "for the violation of the written rules and regulations adopted by the Board of Public Works or issued by the police chief". The City claimed that no "written rules and regulations" had been adopted. The trial court held that the ordinance did not require demotions to be for cause and, therefore, there was no need for notice or a hearing. On appeal, the Court of Appeals of Indiana stated the following:

> "The municipal ordinance affirmatively created an expectation, on the part of each policeman, that he would continue in his rank unless he violated one of the written rules and regulations. The City of Whiting could not deny this expectation and then defend its acts of demotion on the theory that no written rules or regulations had been adopted. This expectation constituted a property interest, or legitimate claim of entitlement, which was protected by the due process clause of the Fourteenth Amendment." *Id.* at 1002.

The evidence presented to the trial court in *Grenchik* established that the policemen were aware of a variety of *unwritten* rules and regulations to which they were required to conform their behavior.

It is clear in this Court's decision in *Perry* that a public employee's property interest in his job may arise from an implied contract. An implied contract is created by the conduct of the parties to the contract, and it is as binding as any written contract of employment or any handbook setting forth work rules and regulations.

> "An implied contract, that is, one wherein an agreement was arrived at by the acts and conduct of the parties, is equally as binding as an express contract, wherein the agreement was arrived at by their words, spoken or written. In either case, it grows out of the intention of the parties to the transaction. If there has been a meeting of the minds and the clear intent of the parties to the transaction is evidenced by their acts and conduct viewed in the light of the surrounding circumstances, then the resultant implied contract differs from an express contract only in the mode of proof." *Clark Realty, Inc. v. Clarke*, ____ Ind.App. ____, 354 N.E.2d 779, 782 (1976).

In the case at bar, the Petitioner had an implied contract based upon Board policy for discharge and established past practices which created a procedure for discharge. No substantial distinction can be drawn between the rules and regulations for discharge that existed in *Harris* and the written, as well as the unwritten, rules and past practices promulgated and fostered by the Respondent, Greenfield-Central. Both situations bestow upon the employee a "legitimate claim of entitlement to continued employment" until the public employer fully complies with prescribed procedure for discharge. As a result of eleven years of consistent use, Greenfield-Central's past practices for discharge were mutually understood by employer and employees alike. The practices remained consistent and unchanged, and they were in existence at the time that the Petitioner was discharged.

The finding of a legitimate claim of entitlement to continued employment under the circumstances of the instant case was implied by this Court in *Perry*:

> "The law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be 'implied'." 3 A. Corbin on Contracts §§561-572A (1960). "Explicit contractual provisions may be supplemented by other agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances'. And, '(t)he meaning of (the promisor's) words and acts is found by relating them to the usage of the past'. *Ibid.*" *Perry, supra*, at 602, 33 L.Ed.2d at 580, 92 S.Ct. at 2700.

## II. DISCHARGE OF A PUBLIC EMPLOYEE IN RETALIATION FOR HER HUSBAND'S EXERCISE OF FREE SPEECH CONSTITUTES ARBITRARY AND CAPRICIOUS CONDUCT

The Hancock Circuit Court found that the discharge of the Petitioner was motivated in part by her husband's public criticism of Respondent Glenn's performance as Superintendent. Petitioner respectfully requests this Court to adopt the holding of *Hayes v. Cape Henlopen School District et al.*, 341 F. Supp. 828 (D.Del. 1972), which concluded that the discharge of a public employee in retaliation for her spouse's exercise of free speech is patently arbitrary and capricious and constitutes a violation of substantive due process:

> "This Court is unable to conceive how the Constitution could countenance a different result when the punitive measures are directed not at the individual exercising the right but at his wife. Such a procedure is, if anything, considerably more invidious and difficult to counteract than direct reprisal. The Court is of the opinion that the theory underlined in the holding of *Keyishian, Pickering*, etc., cases above, mandates that the decision not to rehire Mrs. Hayes could not permissibly be motivated by the Board's desire to retaliate against her husband.... A dismissal based on another person's exercise of a constitutional right is so patently arbitrary and capricious as to be a deprivation of substantive due process." *Id.* at 836.

Appellant was discharged because of her association with her husband, Jack McQueeney, a School Board member, who publicly and privately criticized Respondent Glenn. A public employee cannot be legally discharged as the result of her marital or political associations. The case of *Elrod v. Burns*, 127 U.S. 347, 49 L.Ed.2d 547, 96 S.Ct. 2673 (1976), dealt with the question of the constitutionality of dismissing public employees for partisan reasons. This Court held that such practices were in direct violation of a public employee's rights to political belief and association:

> "Under that practice, public employees hold their jobs on the condition that they provide, in some acceptable manner, support for the favored political party. The threat of dismissal for failure to provide that support unquestionably inhibits protected belief and association, and dismissal for a failure to provide support only penalizes its expression. The belief and association which government may not ordain indirectly are achieved by indirection." *Id.* at 557.

The decision of *Elrod* is directly applicable to this case. *Elrod* is not confined to political activities of only the two major political parties. When a public employee is discharged for the reason that it is assumed or believed that she is associated with the political expressions and beliefs of her husband, who is a political opponent of the school Superintendent, then such discharge is illegal. It is difficult to imagine a more invidious obstruction to political belief and association than the exercise of the power to discharge a public employee due to her assumed or actual associations with the political expressions of her husband.

## III. WHETHER A PUBLIC EMPLOYEE, WHO HAS PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT HER DISCHARGE WAS PARTIALLY MOTIVATED BY CONSTITUTIONALLY IMPERMISSIBLE CONSIDERATIONS, HAS THE BURDEN TO PROVE THAT SHE WOULD NOT HAVE BEEN DISCHARGED BUT FOR SUCH CONSTITUTIONALLY IMPERMISSIBLE CONSIDERATIONS.

The Hancock Circuit Court specifically concluded that the desire to retaliate against the Petitioner's husband may have contributed to the decision to discharge her. Initially, a public employee has the burden of proving by a preponderance of the evidence that the constitutionally impermissible consideration was "a motivating factor" in the decision to discharge her. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 50 L.Ed.2d 471, 97 S.Ct. 568 (1977). At that point, the burden of proof shifts to the public employer to establish by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 50 L.Ed.2d 450, 97 S.Ct. 555 (1977).

In the case at bar, the Petitioner was able to prove to the Hancock Circuit Court that her discharge was motivated in part by the Respondent's need to retaliate against her husband for his outspoken criticism of the Superintendent. As stated in *Village of Arlington, supra*, at that point the burden of proof should have shifted to the Respondents, Glenn and Greenfield-Central, to establish by a preponderance of the evidence "that the same decision would have resulted even had the impermissible purpose not been considered". *Village of Arlington, supra*, at 270, n. 21, 50 L.Ed.2d at 468, n. 21, 97 S.Ct. at 566, n. 21.

Clearly, the trial court was not aware that the burden of proof in this type of case shifts to the public employer once

the employee has established that constitutionally permissible conduct was considered in the discharge. The Respondents failed to meet that burden of proof. It is the evidence that the Petitioner adequately performed her duties up to the time of her discharge. Petitioner's work record was thoroughly reviewed at trial; she had a good record. There were no notations in her record of absenteeism, tardiness, misfeasance or malfeasance. The record, as well as the Findings of Fact, indicate that there was no basis for the discharge of Patricia McQueeney, other than her husband's opposition to the Respondent Glenn. In the case at bar, the constitutionally permissible conduct was Petitioner's husband's exercise of free speech, which was his public criticism of Respondent Glenn.

## CONCLUSION

The trial court has made findings indicating that Jack McQueeney's criticism of the Superintendent was a motivating factor in his wife's discharge, if not the motivating factor. There were a series of official actions taken by Superintendent Glenn which were designed to pressure and punish Mrs. McQueeney as a direct result of her husband's criticism of the Superintendent. The purpose of 42 U.S.C. §1983 is to protect constitutional rights, thereby limiting the abuse of power. That is the issue of this case. The chain of events that were the result of Jack McQueeney's criticism of Max Glenn was established by the Court in its Finding No. 49, and therefore, must be dealt with by this Court.

Mrs. McQueeney has a property interest and therefore, a legitimate claim of entitlement by reason of the discharge procedure.

In summary, if the decision to discharge Petitioner was "motivated in part" by public statements of her husband, or if the statements were "considered" in reaching the decision to discharge her, then the burden of proof shifted to the Respondents to prove by a preponderance of the

evidence that the same decision would not have been made, even if the constitutionally protected conduct had not been considered. The Hancock Circuit Court did not find that the Respondents had proven by a preponderance of the evidence that there was any other reason for such discharge. This Court should review this matter for ultimate reversal due to Respondents' failure to meet the required burden of proof.

Respectfully submitted,
YAEGER, FOLEY & CUTTER

By /s/ _____
Donald F. Foley
Attorney for Petitioner

_____
Tony H. Abbott
Attorney for Petitioner

# APPENDIX

# APPENDIX "A"

IN THE

## Hancock County Circuit Court

STATE OF INDIANA )
) SS: CAUSE NO. 37864
COUNTY OF HANCOCK )

PATRICIA McQUEENEY, *Plaintiff,* vs.

MAX GLENN, as an individual and as Superintendent of the Greenfield-Central School Corporation, and GREENFIELD-CENTRAL COMMUNITY SCHOOL CORPORATION through SALLY CONE as Trustee, RICHARD ELSBURY as Trustee, ROBERT B. ERWIN as Trustee, JOHN T. WHISLER as Trustee, JACK McQUEENEY as Trustee, and ELINORE McNICHOLS as Trustee, *Defendant.*

FILED
IN HANCOCK CIRCUIT COURT
Aug 7 1978
Shirley Riddle
CLERK

### SECOND AMENDED COMPLAINT FOR AN INJUNCTION AND DAMAGES

Comes now the Plaintiff, Patricia McQueeney, by counsel, and for her cause of action versus the Defendants, alleges and says, that:

1. Plaintiff is a citizen of the United States of America and was continuously employed as a general office secretary to the central office of the Greenfield-Central Community School Corporation for a period of over seven years prior to March 3, 1978.

2. Since on or about July 1, 1975, the Defendant Max Glenn is and has been the Superintendent of the Greenfield-Central Community School Corporation.

3. On the date the original complaint was filed the school trustees of the Greenfield-Central Community School Corporation were Sally Cone, Richard Elsbury, Robert B. Erwin, John T. Whisler, and Jack McQueeney, the husband of the Plaintiff; Elinore McNichols was appointed to the Board of School Trustees on or about April 14, 1978 to fill the position vacated by Sally Cone. There have been no other changes to date in the Board of Trustees.

4. This Court has jurisdiction over the subject matter of this lawsuit by reason of 42 U.S.C. §1983.

5. The Greenfield-Central Community School Corporation is a public employer pursuant to 42 U.S.C. §1983, and such school corporation receives state and federal funds.

6. Prior to March 3, 1978, Plaintiff worked in the same office with and under the direct supervision of the Defendant Max Glenn.

7. In November of 1976 the Plaintiff's husband, Jack McQueeney, was elected to the Greenfield-Central Community School Corporation Board of School Trustees and he assumed office on July 1, 1977.

8. Plaintiff's husband, Jack McQueeney, has been in conflict with the Defendant Max Glenn concerning several public issues, involving the policies of the Greenfield-Central Community School Corporation since Jack McQueeney assumed his office as a member of said Board of Trustees on July 1, 1977.

9. On several occasions, the opinions expressed and positions taken by Jack W. McQueeney have not conformed

with the opinions and positions of the Defendant Glenn, who at such times presided over the public and private meetings of the Greenfield-Central Board of School Trustees.

10. For a period of approximately two weeks prior to March 3, 1978, Jack McQueeney repeatedly raised questions at public meetings of the school board as to whether the Defendant Glenn had taken actions in direct contravention of the school board policies and procedures which questions produced extended debate among the school board members, the Defendant Glenn, and citizens attending such meetings.

11. On March 3, 1978 the Defendant Glenn arbitrarily, capriciously and summarily discharged the Plaintiff.

12. The Defendant Glenn's action in summarily discharging the Plaintiff was in response to and in retaliation for Jack McQueeney's exercise of his constitutional right to free speech, as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

13. By and through Defendant's said retaliatory discharge of Plaintiff, Defendant sought to restrict and obstruct Jack McQueeney as the duly elected representative of the Fourth District of the Greenfield-Central Community School Corporation.

14. Plaintiff's retaliatory discharge was arbitrary and capricious, and as a result thereof, Plaintiff was deprived of her right to substantive due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

15. Plaintiff was employed as a "general office secretary", and pursuant to the handbook of job descriptions and organization charts of the Greenfield-Central Community School Corporation (1976), Section II, Plaintiff's term of employment was to have been for nine

and one-half (9 1/2) months, each year beginning in late August and ending in May of each year.

16. At the time of Plaintiff's said discharge, Defendants failed and refused to give Plaintiff a statement of reasons for her discharge as requested by Plaintiff and further failed to offer Plaintiff a hearing concerning her discharge; such omissions on the part of the Defendants constitute a violation of Plaintiff's right to procedural due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

17. In accordance with Indiana Code 20-5-2-2(7) the Greenfield-Central Community School Corporation's Board of Trustees is empowered with the ultimate authority to discharge and hire employees of the school corporation.

18. At all times herein mentioned the Defendant Max Glenn as Superintendent of the Greenfield-Central Community School Corporation was acting for and on behalf of said school corporation, and as its agent.

19. All of the acts and omissions of Max Glenn alleged herein were approved, confirmed or ratified by the Board of Trustees of the Greenfield-Central Community School Corporation.

20. In the course of said discharge, the Defendant Glenn acted with hostility to the Plaintiff, he failed and refused to give the Plaintiff explanations for her discharge upon request, all of which conduct constituted bad faith, malice and gross disregard for the rights of the Plaintiff.

21. Defendant Glenn herein acted intentionally and willfully in his individual capacity.

22. By reason of the facts set forth above, Plaintiff has been wrongfully deprived of her employment including her regularly paid wages in the amount of Two Hundred Sixty Eight Dollars ($268.00) bi-monthly for forty (40) hours per week, Blue Cross-Blue Shield hospitalization insurance benefits, term life insurance benefits through Washington

National Life Insurance Company, disability income benefits, accumulated sick leave and accumulated personal days. Plaintiff is also entitled to damages as provided in Indiana Code 22-2-5-2.

23. By reason of Defendants' deprivation of Plaintiff's above described property and liberty, an emergency exists, and therefore, Plaintiff requests that the Court set an immediate hearing for a preliminary injunction pursuant to Indiana Trial Rule 65 for the purposes of Plaintiff being reinstated as a general office secretary at the central office of the Greenfield-Central Community School Corporation under the same terms and conditions to which she was entitled at the time of her discharge. Plaintiff further suffered great harm by reason of lost wages, benefits, employment, her reputation as a good employee, and her good name in the community for confidentiality, honesty and integrity as a result of said discharge.

By reason of the facts set forth above, Plaintiff has been deprived of her rights under the First Amendment to the United States Constitution to free speech, freedom of association and her freedom of political belief.

24. By reason of the facts set forth above, Plaintiff has had to engage an attorney and is entitled to reasonable attorney fees pursuant to 42 U.S.C. §1983, as well as under Indiana Code 22-2-5-2.

25. By reason of the facts set forth above, Plaintiff is entitled to a preliminary and permanent injunction.

WHEREFORE, the Plaintiff, Patricia McQueeney, by counsel, respectfully prays that the Court enter judgment in favor of the Plaintiff and versus said Defendants as follows:

(a) That a preliminary injunction and permanent injunction issue requiring Defendants, in their official capacities, to reinstate the Plaintiff as general office secretary at the central office of the Greenfield-Central Community School Corporation under the same terms and

conditions to which she was entitled at the time of her discharge;

(b) That the Plaintiff be awarded back pay from the time of her discharge to the time of her reinstatement plus interest thereon, as a part of the requested injunctive relief;

(c) The Court order a continuation of all benefits incident to her employment to which the Plaintiff was entitled at the time of her discharge, the same as if she had not been discharged.

(d) Punitive damages in the amount of Five Thousand Dollars ($5,000.00) from the Defendant Max Glenn in his individual capacity;

(e) Reasonable attorney fees in accordance with 42 U.S.C. §1983, and for all other proper relief in the premises.

YAEGER, FOLEY & McLIN

By /s/ Donald F. Foley
Donald F. Foley
Attorney for Plaintiff

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been hand delivered to Mr. John Van Winkle, Ging, Free, Brand, Tosick & Van Winkle, 17 E. South Street, Greenfield, IN this 7th day of August, 1978.

/s/ Donald F. Foley
Donald F. Foley

Donald F. Foley
YAEGER, FOLEY & McLIN
620 Union Federal Building
Indianapolis, Indiana 46204
639-5633

CERTIFICATION

I, Majorie H. O'Laughlin, Clerk of the Supreme Court and Indiana Court of Appeals do hereby certify that the above and foregoing is a full true, complete and correct copy of the original Record of Proceedings 1-379A100 as the same appears upon the record of said court, and in my custody as Clerk.

In testimony Whereof I have hereunto subscribed my name and affixed the Seal of Said Court this 28 day of October, 1980.

/s/ Marjorie H. O-Laughlin, Clerk
By /s/ Carol A. McGowan, Deputy

# APPENDIX "B"

IN THE
## Hancock Circuit Court

STATE OF INDIANA )
) SS: CAUSE NO. 37864
COUNTY OF HANCOCK )

PATRICIA McQUEENEY )
vs. )
)
MAX GLENN, as an individual )
and as Superintendent of )
the Greenfield-Central )
School Corporation, and )
GREENFIELD-CENTRAL )
COMMUNITY SCHOOL )
CORPORATION )

FILED
IN HANCOCK CIRCUIT COURT
Oct 19 1978
Shirley Riddle
CLERK

### COURT'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT DENYING INJUNCTION

### I.
### FINDINGS OF FACT

This matter came for hearing on plaintiff's complaint for a preliminary injunction on August 14, 1978; evidence was concluded on September 26, 1978; and the parties having stipulated to consolidate the evidence submitted herein on the preliminary injunction for the evidence on the trial of the merits of plaintiff's complaint for a permanent injunction, the Court, in accordance with Trial Rule 65(D), finds as follows:

1. Plaintiff, Patricia McQueeney, is a citizen of the

United States and was a public employee having been employed as a general office secretary for seven (7) years by the Greenfield-Central Community School Corporation prior to March 3, 1978.

2. The Greenfield-Central Community School Corporation received federal funds, as well as funds from the State of Indiana.

3. The Greenfield-Central Community School Corporation is and was on March 3, 1978, a "person" under 42 U.S.C. §1983.

4. Pat McQueeney worked for several years as secretary to Keith Davis who was Assistant Superintendent of Schools.

5. The plaintiff satisfactorily performed her duties as described in the school corporation's "Job Description Handbook," as well as other duties periodically assigned to her.

6. No central office employee of the school corporation had been discharged by the Superintendent or the School Board for a period of eighteen (18) years prior to March 3, 1978.

7. Dr. Max Glenn was appointed Superintendent of Schools in July of 1975.

8. There were no problems in the working relationship between Max Glenn and Keith Davis or Max Glenn and Patricia McQueeney in the fall semester of 1975.

9. Frictions or problems developed in the relationship between Max Glenn and Keith Davis in the spring semester of 1976.

10. Patricia McQueeney observed this friction and problems and was upset by what she considered to be unprofessional and ill treatment of Keith Davis by Max Glenn.

11. During the tenure of her employment with the Greenfield-Central Community School Corporation, Patricia McQueeney was the wife of and married to Jack McQueeney.

12. In September of 1976, Jack McQueeney filed an application to stand for election from District 4 to the School Board of the Greenfield-Central Community School Corporation.

13. In November 1976, Jack McQueeney was elected to the School Board of the Greenfield-Central Community School Corporation.

14. On July 1, 1977, Jack McQueeney became an acting member of the School Board of the Greenfield-Central Community School Corporation.

15. For the past several years, the Greenfield-Central Community School Corporation has had in its employ persons related by blood or marriage including husbands and wives, wherein one spouse served in an administrative capacity while the other spouse served in a non-decision making capacity for such school system.

16. In a seventeen-year period prior to March 3, 1978, no spouses of administrative employees or board members were discharged due to their marital status or for alleged "conflict of interest.".

17. It had been the past practice of the Greenfield-Central Community School Corporation for several years prior to March 3, 1978, to provide employees who had failed to perform their duties satisfactorily with a conference with an administrator principal of the school system; and in such conference, the employee would be informed of any deficiencies in work performance, provided a period of time to correct such deficiencies (usually thirty days); and if such deficiencies in the employee's work performance were not corrected within said period of time, then the employee was given the option to resign or have the question of the employee's discharge presented to the School Board for action.

18. The aforesaid past practice concerning discharge of employees was not followed in the matter of the discharge of Patricia McQueeney.

19. For a period of at least one (1) year prior to March 3, 1978, the Superintendent, Max Glenn, submitted other questions of employee discharge to the School Board for action.

20. The School Board of the Greenfield-Central Community School Corporation was the employer of Patricia McQueeney.

21. In the spring semester of 1976, Patricia McQueeney spoke with a school board member, Sally Cone, about what she considered to be the unprofessional and ill treatment of Keith Davis by Max Glenn.

22. Sally Cone reported the conversation she had had with Patricia McQueeney to Max Glenn; and Max Glenn was able to surmise that it had been with Patricia McQueeney and Sally Cone confirmed that fact to Max Glenn.

23. In the spring semester of 1976, Max Glenn gave the school board his opinion that Keith Davis should be transferred to one of the schools and in June of 1976 the school board transferred Keith Davis.

24. Patricia McQueeney had no written contract of employment.

25. There was a job description handbook made up by the school corporation which described the job of general office secretary as being one in which the person worked nine and one-half (9½) months of the year.

26. Patricia McQueeney was loyal to, fond of, and had great respect for Keith Davis.

27. When Patricia McQueeney returned to work in the fall semester of 1976, her attitude toward Max Glenn had changed.

28. When Patricia McQueeney returned to work in the fall semester of 1976, she did the work assigned her adequately; but she displayed bitterness toward Max Glenn.

29. Problems or friction in the working relationship between Max Glenn and Patricia McQueeney began to develop in the fall semester of 1976.

30. Jack McQueeney made no public statements critical of Max Glenn during the fall semester of 1976 or until he took office in June of 1977.

31. Patricia McQueeney was bitter about the demotion of Keith Davis and this bitterness was apparent in the fall of 1976 and it affected the working relationship between Max Glenn and Patricia McQueeney and coolness developed in the relationship as a result of this bitterness; and the coolness gradually got worse as time went on.

32. At least five of the members of the school board in December of 1976 were of the opinion that Patricia McQueeney should not work in the central office since her husband was elected to the school board.

33. In December of 1976, the members of the school board met with Jack McQueeney and at least three of those members stated their opinion that Patricia McQueeney should not work in the central office since her husband had been elected to the school board; and a transfer was suggested at that time.

34. Both Patricia McQueeney and Jack McQueeney informed the board member or members that they did not see any problem or conflict with Patricia McQueeney working in the central office and that they would take a transfer "personally."

35. At least three of the members of the board at that time, in December of 1976, instructed or told Dr. Max Glenn that he was to deal with the central office personnel matter as he saw fit.

36. In July of 1977, Jack McQueeney and Dr. Robert Erwin assumed their duties as board members.

37. After July 1977, the new board consisting of Jack McQueeney, Sally Cone, John Whisler, Richard Elsbury

and Dr. Robert Erwin met and the subject of Patricia McQueeney being in the central office was again discussed.

38. In that meeting, Sally Cone, John Whisler, Richard Elsbury and Dr. Robert Erwin each gave their opinion that Patricia McQueeney should not be in the same office as Max Glenn; and those four instructed or told Max Glenn that the situation was his to deal with and that he should handle it as he saw fit.

39. In that meeting, Jack McQueeney said that he did not see any necessity for Patricia McQueeney to be moved out of the central office.

40. In September of 1977, Dr. Gene Denisar, the Assistant Superintendent, at the direction of Dr. Max Glenn, met with Patricia McQueeney and told her that she was needed at Harris Elementary School to assist the librarian there.

41. Patricia McQueeney refused to be transferred to Harris Elementary.

42. Patricia McQueeney told Jack McQueeney about the meeting with Dr. Denisar about the Harris transfer; and Jack McQueeney arranged a meeting between himself and Max Glenn about the transfer that very day.

43. Jack McQueeney told Max Glenn his desire or opinion that Patrician McQueeney should not be transferred out of the central office.

44. Dr. Denisar left the school corporation in September of 1977.

45. From September 1977 through March 3, 1978, Jack McQueeney privately and publicly criticized the policies and performance of Max Glenn as Superintendent of the Greenfield-Central Community School Corporation.

46. Patricia McQueeney told Robert Rodocker, a principal in the school system, in October of 1977 that although it was not meant as a threat to him, some other principals had better shape up or they would be out of a job.

47. Robert Rodocker reported this conversation to Max Glenn.

48. The friction and problems between Max Glenn and Patricia McQueeney adversely affected the working atmosphere in the central office.

49. After Jack McQueeney began to make both public and private criticism of Max Glenn and of Max Glenn's performance as Superintendent of Schools, the relationship between Max Glenn and Patricia McQueeney became progressively worse to the extent that during the period of several months prior to the discharge, the defendant Max Glenn ignored the plaintiff when she was in his presence, displayed hostility towards her and severed communications seven months prior to her discharge. Such conduct of the defendant Max Glenn occurred after Jack McQueeney became an acting school board member and after he began criticizing the performance and policies of Max Glenn.

50. In February 1978, the defendant Max Glenn caused a newspaper advertisement to be placed in a newspaper of general circulation in the community of Greenfield, Indiana, which advertised a secretarial job opening calling for generally the same duties as those described in the plaintiff's job description entitled "general office secretary."

51. Toni Tschabold was hired at an hourly rate higher than Patricia McQueeney and worked in the central office doing secretarial work for Dr. Max Glenn.

52. Prior to January 1, 1978, Max Glenn had notified all school board members of executive meetings.

53. Beginning in January 1978, Max Glenn stopped notifying Jack McQueeney of such executive board meetings and delegated that task to be done by the Superintendent's secretary, Martha Zumwalt.

54. Prior to the discharge, the defendant Max Glenn attempted to transfer Mrs. McQueeney from her job as a

general office secretary to the position of assistant librarian, which position of assistant librarian involved lesser responsibilities, benefits and wages; and said Superintendent reassigned the plaintiff's work so that she did not have sufficient work to keep her busy and also hired "extra labor" to perform many of her assigned responsibilities.

55. An executive session was scheduled for the board by Max Glenn for March 2, 1978, and the agenda for that executive meeting stated it was to discuss "personnel matters."

56. Max Glenn informed the board at the executive session that unless there was any objection, he intended to move Patricia McQueeney out of the central office. Only Jack McQueeney objected.

57. The major issues which Jack McQueeney raised at the March 2, 1978, board meeting concerned the advertisement for a secretary, which he knew to be related to his wife's job.

58. Plaintiff had no notice prior to March 3, 1978, that she would be discharged.

59. Patricia McQueeney was called in on March 3, 1978, by Max Glenn and in the presence of Ron Myers was informed that her job in the central office was terminated and that she could turn in her keys now or take a two-week vacation during which time a transfer to one of the schools would be explored.

60. Patricia McQueeney opted to turn in her keys and did so by having her husband deliver them to Max Glenn on March 6, 1978.

61. At the first board meeting following March 3, 1978, the board passed a resolution stating that the actions of Max Glenn were done in good faith.

62. The Board ratified the actions of Max Glenn.

63. The actions of Max Glenn in discharging Patricia McQueeney were approved by the Board of Trustees of the Greenfield-Central Community School Corporation after March 3, 1978.

64. There are no written minutes of the Board of Trustees of the Greenfield-Central Community School Corporation which show that the Board voted for or approved the transfer or discharge of Patricia McQueeney between July 1, 1975, and March 3, 1978.

65. There are no written minutes of the Board of Trustees of Greenfield-Central Community School Corporation which show that the Board voted for or approved the delegation of authority to Max Glenn to discharge non-certified employees without Board approval between July 1, 1975, and March 3, 1978.

66. There is no reference in the minutes of the Board of Trustees of Greenfield-Central Community School Corporation between July 1, 1975, and March 3, 1978, as to any action by the Board to change past practices for the discharge of non-certified employees.

## II.
## CONCLUSIONS OF LAW

The Court having entered its foregoing Findings of Fact, now enters the following Conclusions of Law thereon.

1. This Court has jurisdiction over the parties and the subject matter of this action.

2. The plaintiff did not sustain the burden of proving that she had an implied contract of employment with the defendant Greenfield-Central School Corporation. The "Job Description Handbook" of the defendant school corporation which describes the job of general secretary as a nine and one-half (9½) month job was merely descriptive of the position and did not constitute a contract for a period of nine and one-half (9½) months.

3. The plaintiff, Patricia McQueeney, was an employee at will of the defendant Greenfield-Central Community School Corporation; and her employment was terminable without cause so long as it was not terminated for a reason which was constitutionally impermissible or in violation of any statutory or common law right.

4. Under the law of the State of Indiana, plaintiff, Patricia McQueeney, had not proprietary interest in the right of continuing employment by the defendant school corporation, since she had neither an express or implied contract of employment, and under State law was an employee at will.

5. The plaintiff did not sustain her burden of proof that she was wrongfully discharged on March 3, 1978.

6. The School Board ratified the acts of Max Glenn taken in the March 3, 1978, meeting he had with plaintiff, Patricia McQueeney.

7. The plaintiff did not sustain her burden of proof that her discharge was arbitrary, capricious, and unreasonable.

8. Although the criticism of Max Glenn and performance as Superintendent of the Schools by plaintiff's husband, Jack McQueeney, as a member of the School Board, may have contributed to the decision to discharge the plaintiff, the plaintiff did not prove by a preponderance of the evidence that she would not have been discharged had it not been for the statements of her husband; and in fact, the evidence showed that the School Board had considered the matter of the replacement of the plaintiff in the position of general secretary in the central office of the school corporation prior to the time plaintiff's husband took office as a member of the School Board and prior to his making any criticism of the Superintendent.

9. As an employee at will, plaintiff was not entitled to any notice of her dismissal, or to any hearing, or statement of reasons.

10. Plaintiff did not sustain her burden of proof that her discharge deprived her of procedural due process of law.

11. Plaintiff did not sustain her burden of proof that her discharge deprived her of the right to substantive due process of law.

12. Plaintiff did not sustain her burden of proof that her discharge was made in retaliation to her husband's exercise of his right to free speech.

13. Plaintiff did not sustain her hurden of proof that her discharge did deprive her of her right of free speech or right of association.

14. Plaintiff did not sustain her burden of proof that her discharge was made in bad faith.

15. The discharge of the plaintiff was not motivated by any constitutionally impermissible consideration or reason, nor was her discharge in violation of any statutory, common law, or contractual right.

16. The plaintiff has not been deprived of liberty or property without due process of law, either procedural or substantive due process.

17. The evidence did not show that the plaintiff is entitled to a preliminary or permanent injunction ordering reinstatement to her former employment.

18. The law is with the defendants; and plaintiff's request for a preliminary and permanent injunction ordering the defendant Greenfield-Central Community School Corporation to reinstate the plaintiff, Patricia McQueeney, as a nine and one-half (9½) month central office general secretary as prayed for in her complaint, and her request for a preliminary and permanent injunction should be denied.

## III.
## JUDGMENT

The Court having entered its Special Findings of Fact and Conclusion of Law, now enters its Judgment thereon as follows:

THEREFORE, IT IS CONSIDERED, ORDERED, ADJUDGED, AND DECREED by the Court that the plaintiff's application and prayer for a preliminary and permanent injunction ordering the defendant Greenfield-Central Community School Corporation to reinstate plaintiff to her former position as general secretary in the central office of such school corporation, together with all fringe benefits, is hereby denied, and judgment is entered in favor of the defendants and against the plaintiff on plaintiff's application and prayer for preliminary and permanent injunction.

ALL OF WHICH IS CONSIDERED, ORDERED, ADJUDGED, AND DECREED by the Court this 19th day of October 1978.

/s/ Wesley W. Ratliff, Jr.
Wesley W. Ratliff, Jr.
Special Judge

I hereby certify that copies of the above and foregoing Special Findings of Fact, Conclusions of Law, and Judgment were mailed or delivered to Donald Foley, attorney for plaintiff; and to John W. Van Winkle, attorney for defendants, this ____ day of October 1978.

Clerk

CERTIFICATION

I, Majorie H. O'Laughlin, Clerk of the Supreme Court and Indiana Court of Appeals do hereby certify that the above and foregoing is a full true, complete and correct copy of the original Record of Proceedings 1-379A100 as the same appears upon the record of said court, and in my custody as Clerk.

In testimony Whereof I have hereunto subscribed my name and affixed the Seal of Said Court this 28 day of October, 1980.

/s/ Marjorie H. O'Laughlin, Clerk
By /s/ Carol A. McGowan, Deputy

# APPENDIX "C"

IN THE

## Hancock County Circuit Court

STATE OF INDIANA )
) SS: CAUSE NO. 37864
COUNTY OF HANCOCK )

PATRICIA McQUEENEY, )
*Plaintiff,* )
)
VS. ) FILED
) IN HANCOCK CIRCUIT COURT
MAX GLENN, as an individual and ) Aug 7 1978
as Superintendent of the Greenfield- ) Shirley Riddle
Central School Corporation, and ) CLERK
GREENFIELD—CENTRAL )
COMMUNITY SCHOOL )
CORPORATION )
*Defendants.* )

### MOTION TO CORRECT ERRORS

Comes now Patricia McQueeney, by counsel, and respectfully moves the Court to correct errors of the record pursuant to Trial Rule 59, as follows:

1. The Court's judgment and findings are clearly erroneous in that the Court erred in finding that Plaintiff had no implied contract of employment, when work rules were orally communicated to the Plaintiff and were part of the performance of such contract, when the Defendant school corporation had developed a written job description and a benefit handbook for the Plaintiff, and when specific

procedures for discharge had been developed by past practice and were in use by the school corporation.

2. The Court's judgment and findings are clearly erroneous in that the Court erred in failing to find Plaintiff, as a public employee, had a proprietary right to employment by means of implied contract and as a public employee, was denied substantive due process by reason of her arbitrary discharge.

3. The Court's finding and judgment are clearly erroneous in that the Court erred by finding that the past practice of the school corporation and the written job descriptions and benefit policies did not become part of an implied contract of employment of Patricia McQueeney, a public employee.

4. The Court's judgment and findings are clearly erroneous and inconsistent in that the Court found that Plaintiff had properly performed her duties, that no other spouses of administrative employees (which spouses were also employed by the school corporation) had ever been discharged for "conflict of interest", and when there was no evidence supplied by Defendants that such "conflict of interest" in fact existed, and further when the Plaintiff's husband had publicly criticized the Defendants' policies in the months prior to Plaintiff's dismissal, the Court erred in failing to find that the Plaintiff, as a public employee, was not arbitrarily discharged.

5. The Court's findings and judgment are clearly erroneous in that the Court failed to find, contrary to the evidence, that the motivating factor in the discharge of Patricia McQueeney was her husband's opposition to the policies of the Defendants, where the Court correctly found that the Defendant Glenn attempted to transfer the Plaintiff to a job of lesser pay, benefits and responsibilities; that Defendant Glenn had reassigned Plaintiffs work so that she did not have sufficient work to keep her busy; that the Defendant Glenn had hired "extra labor" to perform the duties of the Plaintiff; that the Defendant Glenn had caused

an advertisement to be placed in a local newspaper one month prior to her discharge describing the specific duties of the Plaintiff; and that during the period of time there was public and private debate initiated by Jack McQueeney which was critical of the policies of Glenn up to the date of such discharge.

6. The Court's judgment and findings are clearly erroneous in that the Court failed to find as supported by the evidence that Plaintiff was wrongfully discharged in retaliation for her husband's public opposition to policies of the Defendants.

7. The Court's judgment and findings are clearly erroneous in that the Court found that the Defendant Max Glenn was delegated authority to discharge the Plaintiff when the evidence was that there was no vote taken or public meeting conducted for that purpose as required by I.C. 5-14-1.5-6 et. seq., which statute requires an affirmative vote to be taken by a school board at a public meeting.

8. The Court's findings of fact and judgment are clearly erroneous in that the Court erred in finding that the "opinion" of school board members that the Plaintiff should not work in the central office and that the school board, except for Jack McQueeney, without taking any formal action, delegated authority to the Defendant Glenn to "move Patricia McQueeney out of the office", all of which is contrary to I.C. 5-14-1.5-6(b), I.C. 20-5-2-2(7) and I.C. 20-7-1-1.

9. The Court's findings and judgment are clearly erroneous in that only the Greenfield-Central School Corporation Board of Trustees had the authority to discharge the Plaintiff; the Court erred in finding that Glenn had such authority without prior approval of the school board, which action by Glenn was contrary to I.C. 5-14-1.5-6(b).

10. The Court's findings of fact and judgment are clearly erroneous in that they are inconsistent because the Court found that Plaintiff was not entitled to prior notice of

her discharge, yet the Court found that it was the past practice in the school corporation to provide employees who had failed to perform their duties satisfactorily with a conference with an administrator or principal of the school system, and that in such conference, the employee would be informed of any deficiencies in work performance, provided a period of time to correct such deficiencies, and if the unsatisfactory performance continued, the employee would be given the option of resigning or having the question of discharge submitted to the board; the Court also found that the Plaintiff had satisfactorily performed her duties; yet the Court erroneously found that no notice was necessary in order to discharge Patricia McQueeney as a public employee, all of which is contrary to the procedural due process requirements of the United States Constitution.

11. The Court's judgment and findings are clearly erroneous in that the Court correctly found that the public criticism by Jack McQueeney of the Defendants contributed to the decision to discharge the Plaintiff, when the Court erroneously found that the Plaintiff did not prove by a preponderance of evidence that such criticism was a motivating factor in her discharge, and when such findings are inconsistent with the undisputed evidence that discharge came nine months after Jack McQueeney took office as a school board member, five months after Jack McQueeney began taking private issue with Defendant Max Glenn and three months after Jack McQueeney began taking public issue with Max Glenn and the school board.

12. The Court's judgment and findings are clearly erroneous in that the Court found that the public criticism of the Defendants by Jack McQueeney contributed to the decision to discharge the Plaintiff, when the Court further erroneously concluded that the Plaintiff had the burden to prove that the discharge was solely motivated by such public criticism by Jack McQueeney, which burden of proof on the Plaintiff is contrary to law.

13. The Court's findings and judgment are clearly erroneous in that the Court erred in determining that a public employee who worked under a written job description, written benefits, policies, work rules and specific past practices for discharge was not entitled to notice of her discharge.

14. The Court's findings and judgment are clearly erroneous in that the Court erred in failing to find that the Defendants' actions caused a chilling effect on Plaintiff's First Amendment right to free speech.

15. The Court's findings and judgment are clearly erroneous in that the Court failed to find that Plaintiff was deprived of her liberty by actions of the Defendant.

16. The Court's judgment and findings are clearly erroneous in that the Court failed to find that Defendant Max Glenn's reassignment of Plaintiff's work, his hiring of "extra labor", his hostile conduct towards the Plaintiff did not act as a prior restraint to Plaintiff's right to express her opinions and such conduct produced a chilling effect upon her First Amendment right to free speech.

17. The Court's findings and judgment are clearly erroneous in that the Court erred in failing to find that Plaintiff's expression of her opinion to a school board member, the secretarial petition, Plaintiff's report to her husband concerning her offer of transfer, were motivating factors which caused Max Glenn to discharge Patricia McQueeney, when all such conduct of the Plaintiff was protected by the First Amendment to the United States Constitution.

18. The Court's findings and judgment are clearly erroneous in that the Court erred in failing to find that Plaintiff's dismissal was due to the association of the Plaintiff with her husband, a political opponent of Defendant Glenn and the board, which association resulted in her discharge and such discharge was a denial of her right of freedom of belief and association.

19. The Court's findings and judgment are clearly erroneous in that such judgment is not supported by the weight of evidence and is not supported by and is contrary to the evidence.

20. The Court's findings and judgment are clearly erroneous in that the Court erred in denying the Plaintiff injunctive relief when the Plaintiff does not have an adequate remedy at law.

21. The Court's findings and judgment are clearly erroneous in that the Court erred in failing to find that Patricia McQueeney should be reinstated to her employment.

YAEGER, FOLEY & McLIN

By /s/ Donald F. Foley
Donald F. Foley
Attorney for Plaintiff

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded to Mr. John R. Van Winkle, Ging, Free, Brand, Tosick & Van Winkle, 17 E. South Street, Greenfield, Indiana 46140 by First Class U.S. Mail this 15 day of December, 1978.

/s/ Donald F. Foley
Donald F. Foley

Donald F. Foley
YAEGER, FOLEY & McLIN
620 Union Federal Building
Indianapolis, Indiana 46204
639-5633

STATE OF INDIANA )
) SS:
COUNTY OF HANCOCK )

I, Shirley Riddle, Clerk of Hancock County, do hereby certify this to be a true and correct copy of Motion to Correct Errors as the same appears on record in this office in Order Book 67 Page 124-1.

Witness my hand and seal at Greenfield, Indiana this 27 day of March 1979.

/s/Shirley Riddle
Clerk of Hancock County

CERTIFICATION

I, Majorie H. O'Laughlin, Clerk of the Supreme Court and Indiana Court of Appeals do hereby certify that the above and foregoing is a full true, complete and correct copy of the original Motion To Correct Errors In Record of Proceedings 1-379A100 as the same appears upon the record of said court, and in my custody as Clerk.

In testimony Whereof I have hereunto subscribed my name and affixed the Seal of Said Court this 28 day of October, 1980.

/s/ Marjorie H. O'Laughlin, Clerk
By /s/ Carol A. McGowan, Deputy

# APPENDIX "D"

## FOR PUBLICATION

ATTORNEY FOR APPELLANT:
DONALD F. FOLEY
YAEGER, FOLEY & CUTTER
620 Union Federal Building
Indianapolis, Indiana 46204

ATTORNEY FOR APPELLEES:
JOHN R. VAN WINKLE
GING, FREE, BRAND, TOSICK
& VAN WINKLE
17 E. South Street
Greenfield, Indiana 46140

---

IN THE

## Court of Appeals of Indiana

FIRST DISTRICT

PATRICIA McQUEENEY,
*Plaintiff-Appellant,*

vs.

MAX GLENN, as an individual and as Superintendent of the Greenfield-Central School Corporation, and GREENFIELD—CENTRAL COMMUNITY SCHOOL CORPORATION,
*Defendants-Appellees.*

FILED
Marjorie H. O'Laughlin
Feb 19 1980
CLERK OF THE INDIANA SUPREME AND COURT OF APPEALS

No. 1-379 A 100

**APPEAL FROM THE HANCOCK CIRCUIT COURT**
**The Honorable Wesley W. Ratliff, Jr., Special Judge**

NEAL, J.

Plaintiff-appellant Patricia McQueeney appeals from a judgment denying her action for an injunction and damages against defendants-appellees Max Glenn and Greenfield-Central Community School Corporation.

She raises the following issues for our review:

I. (A) Whether the trial court erred in finding that plaintiff's discharge was not in violation of 42 U.S.C. §1983 (1976).

(B) Whether the trial court's findings of fact and conclusions of law were inconsistent with the judgment, thus making the judgment clearly erroneous.

II. Whether the trial court's judgment was clearly erroneous in finding that plaintiff was an employee at will and lacked a legitimate claim of entitlement to continued employment.

III. Whether the trial court erred in failing to find that the exercise of the right of free speech by plaintiff and her husband was the motivating factor in her discharge, and whether the trial court erred in placing the burden on plaintiff to show that the exercise of the right of free speech was a motivating factor in her discharge.

IV. Whether the trial court's judgment was clearly erroneous in finding that plaintiff had no guaranteed right of due process.

V. Whether the trial court's judgment was clearly erroneous in finding that plaintiff's discharge was not motivated by the exercise of her rights of free speech and free association.

VI. Whether the trial court's judgment was clearly erroneous in concluding that the school board had given defendant Glenn the authority to discharge plaintiff and that the discharge did not violate the statutes of Indiana.

VII. Whether the trial court's judgment was clearly erroneous in concluding that plaintiff was not entitled to a preliminary and permanent injunction for reinstatement and back pay.

We affirm.

The evidence presented at the trial most favorable to support the judgment, and necessary for the determination of this case, is as follows:

Plaintiff was hired as a general office secretary for the central office of the Greenfield-Central superintendent of schools in 1971. There was no evidence that she had a contract, nor was there any evidence that she was promised tenure. On July 1, 1975, defendant Glenn was hired as superintendent of the school corporation. At that time plaintiff's principal duty was secretary to the assistant superintendent, Keith Davis. A conflict between Keith Davis and defendant Glenn led to the former's reassignment to the position of principal at a grade school in June, 1976, whereupon he resigned. Plaintiff was angry at defendant Glenn for what she considered mistreatment of Keith Davis.

In the fall, 1976, plaintiff's husband was elected as a member of the school board. His presence on the school board caused other board members and defendant Glenn to be apprehensive of a possible conflict of interest, though no action was taken. The relationship between plaintiff and defendant Glenn further deteriorated, and the conflict, characteristically, spread and eventually involved the public, the school board members, the media, the husband, etc. The record is amply punctuated with charges and recriminations, the details of which we do not deem necessary to recite here. Suffice to say, there is evidence

that on March 3, 1978, defendant Glenn, with the authority of the majority of the school board, offered plaintiff the option of being transferred to a position in another building or having her employment terminated. Plaintiff insisted upon retaining her position in the central office and caused her keys to be delivered, symbolizing her acceptance of the termination. No hearing was had on her termination.

The evidence is conflicting, and much of the plaintiff's argument in her brief is devoted to the insistence that the trial court committed error in not accepting her version of the events. We will not weight the evidence nor determine the credibility of the witnesses. *McCray Mem. Hosp. v. Hall*, (1967) 141 Ind.App. 203, 226 N.E.2d 915. We will not disturb the ruling of the trial court if there is substantial evidence of probative value to sustain the decision of the trial court. *Lake County Council v. Arrendondo*, (1977) 266 Ind. 318, 363 N.E.2d 218. We are cognizant that a trial court's judgment will be determined to be clearly erroneous only after a review of the evidence leaves us with a definite and firm conviction that the trial court erred. *University Caseworks Systems, Inc. v. Bahre*, (1977) Ind.App., 362 N.E.2d 155.

**I(A), I(B), III and V**
**Freedom of Speech and Freedom of Association**

For the sake of convenience, we join the issues rasied in I(A), I(B), III and V of the assignments of error.

Plaintiff argues essentially, under these headings, that her rights of freedom of speech and freedom of association protected under the First Amendment to the Constitution of the United States were violated by her discharge. She couples this argument with one of similar import, that her discharge was in violation of 42 U.S.C. §1983, which grants a person a cause of action for acts committed under color of state law causing a person to be subject to deprivation of rights secured by the United States Constitution.

Even though a person may not have a property interest or benefit that is protected under procedural due process under the Fourteenth Amendment, that benefit may not be denied if the denial is based upon the contravention of the constitutionally protected right of freedom of speech or association. *Perry v. Sinderman*, (1972) 408 U.S. 593. The Supreme Court of the United States in *Mt. Healthy City Board of Education v. Doyle*, (1976) 429 U.S. 274, further refined the rule. In that case, the contract of a teacher, without tenure, was not renewed after he made a telephone call to a radio station and read a memo from the principal relative to school activities. The Supreme Court held that, initially, the teacher had the burden of showing that the telephone call, protected as freedom of speech under the First Amendment, was a substantial factor in the denial of a new contract. This burden having been met, the second step of the test was that the school board then must show by a preponderance of the evidence that the same decision would have been made without the issue of the teacher's protected conduct.

The plaintiff seems to argue that the court erred in not accepting her version of the evidence and the inferences and conclusions to be drawn therefrom. We have reviewed the evidence, and we find that there was sufficient evidence to support the court's findings and determination that the actions of the school board did not fall within the proscriptions of *Perry, supra, Mt. Healthy City Board of Education, supra*, or 42 U.S.C. §1983.

Plaintiff argues that her discharge violates the public policy of Indiana in that her right of freedom of association, as represented by her marriage to Jack McQueeney, was the basis for a retaliatory discharge. She cites *Frampton v. Central Indiana Gas Company*, (1973) 260 Ind. 249, 297 N.E. 2d 425, which held that retaliatory discharges are against public policy. We agree with the trial court's finding that there was no retaliation.

## II and IV
## Due Process

Plaintiff argues under assignment of errors II and IV that she was not just an employee at will but had a property interest in continued employment. She contends that her job was terminated without notice or hearing, thus denying her procedural due process under the Fourteenth Amendment to the Constitution of the United States.

The opportunity to be heard is a fundamental requirement of due process under the Fourteenth Amendment. The hearing must be meaningful in time and place. *Town of Speedway v. Harris*, (1976) Ind.App., 346 N.E.2d 646. In order for a plaintiff to avail himself of due process protections, he must first show that he had some property interest which was protected by procedural due process. A property interest may arise from a statute, ordinance, or contract. In any event, the sufficiency of the claim or entitlement to such a property interest must be decided by reference to state law. *Gansert v. Meeks*, (1979) Ind.App., 384 N.E.2d 1140.

The foundation of plaintiff's argument is that there existed a practice within the school corporation, which was stated in an employee handbook, requiring a conference with an allegedly errant employee wherein his deficiencies were discussed, and the employee was given an opportunity to correct the deficiencies before being discharged. In this instance, it was not done. Appellant cites *Town of Speedway, supra*, and State ex rel. Warzyniak v. Grenchik, (1978) Ind.App., 379 N.E.2d 997, in support of her argument. Those cases, after reciting the general rules relative to the Fourteenth Amendment due process protections afforded in job relationships with government entities, went ahead to say that in order to have a property interest in a benefit such as a job, a person clearly must have more than an abstract need for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim or entitlement to it. When cause is

required before an employment relationship may be altered to the detriment of the employee, due process protection attaches. The court, in these cases, decided that because of department rules or ordinances, a property interest was created which could not be terminated without affording procedural due process.

In the instant case there was no evidence whatever that any tenure was attached to plaintiff's job such as may have existed in cases where a written contract, ordinance, etc., was involved. This type of situation was dealt with in *Shaw v. S. S. Kresge Company*, (1975) Ind.App., 328 N.E.2d 775. Shaw, an employee of Kresge, was discharged without a hearing. He had no contract, oral or written, for any specific tenure. Kresge had a policy handbook for employees, stating, in effect, that upon receipt of three warning slips for misbehavior in any year, an employee could be brought before an advisory committee for discipline or discharge. Shaw was summarily discharged by Kresge without reference to the policy handbook procedures. Shaw argued that the handbook was a contract of employment. The court said, at page 779 of 328 N.E.2d:

> "Even assuming, *arguendo*, that the handbook relied upon by appellant constituted a part of the contract, in the absence of a promise on the part of the employer that the employment should continue for a period of time that is either definite or capable of determination, the employment relationship is terminable at the will of the employer....There being no binding promise on the part of the employee that he would continue in the employment, it must also be regarded as terminable at his discretion as well. For want of mutuality of obligation or consideration, such a contract would be unenforcible [sic] in respect of that which remains executory."

While *Shaw* is a private employment situation, the principles of contractual relationships are the same. The same rules govern. The property interest here is governed by reference to state contract law.

The case at bar is similar to *Shaw, supra.* There was no express contract. There was no implied contract. An implied contract arises out of acts and conduct of the parties, coupled with a meeting of the minds and a clear intent of the parties in the agreement. *Dyer Construction Co., Inc. v. Ellas Construction Co., Inc.* (1972) 153 Ind.App. 304, 287 N.E.2d 262. There was no evidence that any tenure whatsoever was promised plaintiff, nor could any be implied from any conduct of the parties. She was an employee at will. Therefore, the court did not err in so concluding and in denying her claim which was based upon violation of procedural due process protection under the Fourteenth Amendment.

Further, an employee, even with stated tenure, does not have a property interest in a particular position which is protected as a property interest, absent express contractual or statutory provisions that a certain employment relationship will continue. *Danno v. Peterson,* 421 F. Supp. 950 (n.D. Ill. 1976); *Morris v. City of Kokomo,* (1978) Ind.App., 381 N.E.2d 510. Here, there was evidence that plaintiff was offered a transfer of position which she declined. It is clear that she had no legitimate expectations of continued employment in the central office.

We are, therefore, of the opinion that there was sufficient evidence to support the findings of the court that the plaintiff was an employee at will and had no interest which was protected by procedural due process.

## VI
## Authority to Discharge

Plaintiff also claims that defendant Glenn acted without the authority of the school board thus making it impossible for the board to ratify defendant Glenn's actions.

Plaintiff's argument that the school board had not given defendant Glenn the authority to discharge her conflicts with the record which indicates that in the meetings after

Jack McQueeney was elected to the school board and on March 2, 1978, the school board confirmed that the superintendent had the responsibility of handling noncontractural employee relations, and that the board would support defendant Glenn's actions in those matters.

IND. CODE 20-7-1-1, which gives school boards the authority to hire and fix salaries for clerical personnel, is cited by plaintiff to show that defendant Glenn lacked the authority to fire her. There was evidence that defendant Glenn acted as agent on behalf of the school board when plaintiff was given her options.

Plaintiff also argues that the defendant school violated the Indiana Open Door Law, IND. CODE 5-14-1.5-6 (Supp. 1979), by discharging her without a public meeting. The statute provides that an executive session, closed to the public, may be conducted when an employee's status is to be discussed. The statute also states that "(b) A final action must be taken at a meeting open to the public." We conclude that there was no "final action" by the board since plaintiff's employment was terminated by her decision to turn in her keys, not a decision by the board.

After plaintiff filed her claim against the defendant school, the school board passed a resolution supporting defendant Glenn in this particular matter. It is contended by plaintiff that the school board could not ratify defendant Glenn's action retroactively, citing IND. CODE 20-5-2-2 (Supp. 1979). The pertinent part of the statute reads as follows:

> "In carrying out the school purposes of each corporation, its governing body acting on its behalf shall have the following specific powers:
>
> * * *
>
> (18) *To ratify and approve any action taken* by any member of the governing body, any officer of the governing body or *by any employee of the school corporation after such action is taken,* if such action

> could have been approved in advance, and in connection therewith to pay any expense or compensation permitted under IC 20-5-1 through IC 20-5-6 or any other law." (Emphasis added.)

It is clear that the school board properly ratified defendant Glenn's actions.

## VII

Plaintiff claims that the trial court erred in concluding that she was not entitled to a preliminary and permanent injunction for reinstatement and back pay. As previously stated, plaintiff failed to show that the exercise of the rights of free speech and free association were substantial factors in the termination of her employment or that she had a constitutionally protected property interest in continued employment. Thus, we cannot say that the trial court's findings were clearly erroneous. *University Casework Systems, Inc., supra.*

For the reasons stated above, the decision of the trial is affirmed.

Affirmed.

ROBERTSON, P.J. CONCURS.
YOUNG, J., Participating by designation, CONCURS.

CERTIFICATION

I, Majorie H. O'Laughlin, Clerk of the Supreme Court and Indiana Court of Appeals do hereby certify that the above and foregoing is a full true, complete and correct copy of the original Opinion as the same appears upon the record of said court, and in my custody as Clerk.

In testimony Whereof I have hereunto subscribed my name and affixed the Seal of Said Court this 28 day of October, 1980.

/s/ Marjorie H. O'Laughlin, Clerk
By /s/ Carol A. McGowan, Deputy

# APPENDIX "E"

"Appellant's Petition For Rehearing" DENIED this 24th day of March, 1980.

/s/ Paui H. Buchanan, Jr.
Presiding Judge

IN THE

## Indiana Court of Appeals

NO. 1-379A100

| | | |
|---|---|---|
| PATRICIA McQUEENEY | ) | Appeal From The |
| | ) | Hancock County |
| *Appellant (Plaintiff Below),* | ) | Circuit Court |
| | ) | |
| vs. | ) | |
| | ) | |
| MAX GLENN, as an individual | ) | |
| as a Superintendent of | ) | |
| the Greenfield-Central | ) | |
| School Corporation, and | ) | The Honorable |
| GREENFIELD-CENTRAL | ) | Wesley W. Ratliff, Jr. |
| COMMUNITY SCHOOL | ) | Special Judge |
| CORPORATION, | ) | |
| *Appellees (Defendants Below).* | ) | |

### APPELLANT'S PETITION FOR REHEARING

Comes now the Appellant-Plaintiff, Patricia McQueeney, by counsel, and respectfully requests this Court to grant a rehearing in the above-captioned cause for the following reasons:

1. On February 19, 1980, the Court of Appeals of Indiana, First District, issued a written opinion affirming the Trial Court's decision denying relief sought by the Appellant.

2. The Opinion is in error in each of the following particulars:

a. In deciding, contrary to the law of the State of Indiana, that entrenched past practices for the discharge of non-certified public employees, which practices were promulgated and fostered by the public employer for over eleven (11) years, did not constitute an implied contract which extends to the employee a legitimate claim of entitlement to continued employment;

b. In deciding that past practices for discharge of non-certified public employees did not constitute an implied contract extending to the employee a legitimate claim of entitlement to continued employment, the Opinion is in conflict with the ruling precedent of the United States Supreme Court in the case of *Perry v. Sendermann*, 408 U.S. 725 (1972), in which that Court held that a teacher, who was a public employee, legitimately relied upon rules and mutually explicit understandings promulgated by the school system and which constituted a legitimate claim of entitlement to continued employment;

c. In deciding that past practices for the discharge of public employees did not constitute an implied contract that extended to the employee a legitimate claim of entitlement to continued employment, the Opinion is in conflict with prior opinions of the Court of Appeals which hold that the acts and conduct of the parties constitutes an implied contract, *Dyer Construction Co., Inc. v. Ellas Construction Co., Inc.*, (1972) 153 Ind.App. 304, 287 N.E.2d 262; which hold that a public employer cannot terminate the employee's right to continued employment by failing to adopt written rules and regulations where a city ordinance states that the employee may only be demoted for violation of said written rules and regulations, *State ex rel. Warzyniak v. Grenchick*, (1978) ___ Ind.App. ___, 379 N.E.2d 997; which also hold that a public employer may not preempt an employee's right to continued employment by failing to provide the employee with procedures for

discharge which were established by the written rules and regulations of the employer, *Harris v. Town of Speedway*, (1976) ___ Ind.App. ___, 346 N.E.2d 656;

d. In deciding that the Appellant's First and Fourteenth Amendment rights to free speech and association were not violated, even though the Trial Court specifically concluded that the Appellant's husband's exercise of free speech was a consideration (a motivating factor) in the decision to discharge the Appellant, the Opinion is in direct conflict with and contrary to the holding of the United States Supreme Court in *Elrod v. Burns*, (1976) 427 U.S. 347;

e. In deciding that the Appellant's discharge was not contrary to the public policy of the State of Indiana, eventhough the Trial Court made a specific conclusion that the Appellant's husband's exercise of his free speech was a consideration in deciding to discharge the Appellant, the Opinion is in conflict with the holding of a prior decision of the Indiana Supreme Court in the case of *Frampton v. Central Indiana Gas Co.*, (1973) ___ Ind. ___, 297 N.E.2d 425;

f. The Opinion fails to give a statement in writing of a substantial question arising on the record and argued by the parties as to whether or not the Appellant's Fifth and Fourteenth Amendment rights to substantive due process were violated when the Trial Court specifically concluded that the decision to discharge the Appellant was motivated in part by the public employer's desire to retaliate against the Appellant's husband for the exercise of his free speech as was specifically held in the case of *Hayes v. Cape Henlopen School District, et al.*, (D. Del 1972) 341 F. Supp. 823;

g. The Opinion fails to give a statement in writing and ignores a substantial question arising on the record and argued by the parties regarding a misplaced burden of proof that is demonstrated in the Trial Court's Conclusion of Law No. 8:

> "Although the criticism of Max Glenn (Superintendent) and his performance as superintendent of the schools by plaintiff's husband, Jack McQueeney, as a member of the School Board, *may have contributed to the decision to discharge the plaintiff*, the plaintiff did not prove by proponderance of the evidence that she would not have been discharged had it not been for the statements of her husband;...." (Emphasis Added)

To require *that* the Appellant to prove that she would not have been discharged had it not been for the statements of her husband is in direct conflict with decisions of the United States Supreme Court in the cases of *Mt. Healthy City School District Board of Education v. Doyle*, (1977) 429 U.S. 274; *Village of Arlington Heights v. Metro Housing Development*, (1977) 429 U.S. 252. It is this misplaced burden of proof which was not considered by the Opinion of the Court of Appeals and which has prejudiced the interest of the Appellant in light of the fact that the Trial Court specifically concluded that the desire to retaliate against the Appellant's husband for his free speech was a consideration in the decision to discharge the Appellant, which is all that is required for the Appellant to prove in order to shift the burden of proof to the employer, as specified in *Mt. Healthy* and *Village of Arlington, supra.*

h. In deciding that the Appellant had the burden of proving that retaliation for the exercise of constitutionally protected rights was the sole motivating factor precipitating her discharge, the Opinion is in direct conflict with the decision of the United States Supreme Court in *Mt. Healthy* and *Village of Arlington, supra.* This error is demonstrated on page two of the Opinion where the Court incorrectly paraphrases an issue allegedly presented by the Appellant:

> "Whether the Trial Court erred in failing to find that the exercise of the right of free speech of plaintiff and her husband was *the* motivating factor in her discharge, and whether the Trial Court erred in placing the burden on plaintiff to show that the

> exercise of the right of free speech was a motivating factor in her discharge." (Emphasis Added)

Appellant is not required to prove that retaliation against constitutionally protected rights is the only motivating factor in her discharge, nor was the Appellant contesting the fact that she had the burden of proving that such retaliation was a motivating factor in her discharge. Rather, appellant need only prove that such retaliation was *a motivating factor* and, once established, that the burden of proof shifts to the employer to show that she would have been discharged without regard to the retaliatory motive.

WHEREFORE, for each of the above-specified reasons, the Appellant, Patricia McQueeney, by counsel, respectfully requests this Court to vacate its written Opinion on February 19, 1980, to grant a rehearing, and to reverse the decision of the Trial Court, and for all other relief in the premises.

YAEGER, FOLEY & CUTTER

By /s/ Donald F. Foley/THA
Donald F. Foley

By /s/ Tony H. Abbott
Attorneys for Appellant-Plaintiff

## CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was forwarded to John R. Van Winkle, Ging, Free, Brand, Tosick and Van Winkle, 17 East South Street, Greenfield, Indiana 46140, via U.S. First Class Mail, this 7th day of March, 1980.

/s/ Tony H. Abbott
Tony H. Abbott

YAEGER, FOLEY & CUTTER
620 Union Federal Building
Indianapolis, IN 46204
639-5633

CERTIFICATION

I, Majorie H. O'Laughlin, Clerk of the Supreme Court and Indiana Court of Appeals do hereby certify that the above and foregoing is a full true, complete and correct copy of the original Petition for Rehearing and Denial as the same appears upon the record of said court, and in my custody as Clerk.

In testimony Whereof I have hereunto subscribed my name and affixed the Seal of Said Court this 28 day of October, 1980.

/s/ Marjorie H. O'Laughlin, Clerk
By /s/ Carol A. McGowan, Deputy

# APPENDIX "F"

"Appellant's Petition For Transfer" is hereby DENIED this 28th day of August, 1980.

ALL JUSTICES CONCUR.

/s/ Richard M. Given
RICHARD M. GIVEN,
CHIEF JUSTICE

IN THE

## Supreme Court of Indiana

NO. 1-379A100

| | | |
|---|---|---|
| PATRICIA McQUEENEY | ) | Appeal From The |
| | ) | Hancock County |
| *Appellant (Plaintiff Below),* | ) | Circuit Court |
| | ) | |
| vs. | ) | |
| MAX GLENN, as an individual as a Superintendent of the Greenfield-Central School Corporation, and GREENFIELD-CENTRAL COMMUNITY SCHOOL CORPORATION, | ) | The Honorable Wesley W. Ratliff, Jr. Special Judge |
| *Appellees (Defendants Below).* | ) | |

### APPELLANT'S PETITION FOR TRANSFER

Comes now the Appellant-Plaintiff, Patricia McQueeney, by counsel, and respectfully requests this Court to grant transfer in the above-captioned cause for the following reasons:

1. On February 19, 1980, the Court of Appeals of Indiana, First District, No. 1-379A100, issued a written opinion affirm-

ing the Trial Court's decision denying relief sought by the Appellant.

2. A Petition for Rehearing was timely filed with the Court of Appeals, and a rehearing was denied on March 24, 1980.

3. The Opinion is in error in each of the following particulars:

a. In deciding erroneously a new question of law to the effect that long-established past practices for the discharge of non-certified public employees, which practices were initiated and used by the public employer for over eleven (11) years, did not constitute an implied contract which extends to the employee a legitimate claim of entitlement to continued employment;

b. In deciding that past practices for discharge of non-certified public employees did not constitute an implied contract extending to the employee a legitimate claim of entitlement to continued employment, the Opinion is in conflict with the ruling precedent of the United States Supreme Court in the case of *Perry v. Sendermann*, 408 U.S. 725 (1972), in which that Court held that a teacher, who was a public employee, legitimately relied upon rules and mutually explicit understandings promulgated by the school system and which constituted a legitimate claim of entitlement to continued employment;

c. In deciding that past practices for the discharge of public employees did not constitute an implied contract that extended to the employee a legitimate claim of entitlement to continued employment, the Opinion is in conflict with prior opinions of the Court of Appeals which hold that the acts and conduct of the parties constitutes an implied contract, *Dyer Construction Co., Inc. v. Ellas Construction Co., Inc.*, (1972) 153 Ind.App. 304, 287 N.E.2d 262; which hold that a public employer cannot terminate the employee's right to continued employment by failing to adopt written rules and regulations where a city ordinance

states that the employee may only be demoted for violation of said written rules and regulations, *State ex rel. Warzyniak v. Grenchick*, (1978) ___ Ind.App. ___, 379 N.E.2d 997; which also hold that a public employer may not preempt an employee's right to continued employment by failing to provide the employee with procedures for discharge which were established by the written rules and regulations of the employer, *Harris v. Town of Speedway*, (1976) ___ Ind.App. ___, 346 N.E.2d 656;

d. In deciding that the Appellant's First and Fourteenth Amendment rights to free speech and association were not violated, eventhough the Trial Court specifically concluded that the Appellant's husband's exercise of free speech was a consideration (a motivating factor) in the decision to discharge the Appellant, the Opinion is in direct conflict with and contrary to the holding of the United States Supreme Court in *Elrod v. Burns*, (1976) 427 U.S. 347;

e. In deciding that the Appellant's discharge was not contrary to the public policy of the State of Indiana, eventhough the Trial Court made a specific conclusion that the Appellant's husband's exercise of his free speech was a consideration in deciding to discharge the Appellant, the Opinion is in conflict with the holding of a prior decision of the Indiana Supreme Court in the case of *Frampton v. Central Indiana Gas Co.*, (1973) ___ Ind. ___, 297 N.E.2d 425;

f. The Opinion fails to give a statement in writing of a substantial question arising on the record and argued by the parties as to whether or not the Appellant's Fifth and Fourteenth Amendment rights to substantive due process were violated when the Trial Court specifically concluded that the decision to discharge the Appellant was motivated in part by the public employer's desire to retaliate against the Appellant's husband for the exercise of his free speech as was specifically held in the case of *Hayes v. Cape Henlopen School District, et al.*, (D. Del 1972) 341 F. Supp. 823;

g. The Opinion fails to give a statement in writing and ignores a substantial question arising on the record and argued by the parties regarding a misplaced burden of proof that is demonstrated in the Trial Court's Conclusion of Law No. 8:

> "Although the criticism of Max Glenn (Superintendent) and his performance as superintendent of the schools by plaintiff's husband, Jack McQueeney, as a member of the School Board, may have *contributed to the decision to discharge the plaintiff*, the plaintiff did not prove by preponderance of the evidence that she would not have been discharged had it not been for the statements of her husband;...." (Emphasis Added)

To require the Appellant to prove that she would not have been discharged had it not been for the statements of her husband is in direct conflict with decisions of the United States Supreme Court in the cases of *Mt. Healthy City School District Board of Education v. Doyle*, (1977) 429 U.S. 274; *Village of Arlington Heights v. Metro Housing Development*, (1977) 429 U.S. 252. It is this misplaced burden of proof which was not considered by the Opinion of the Court of Appeals and which has prejudiced the interest of the Appellant in light of the fact that the Trial Court specifically concluded that the desire to retaliate against the Appellant's husband for his free speech was a consideration in the decision to discharge the Appellant, which is all that is required for the Appellant to prove in order to shift the burden of proof to the employer, as specified in *Mt. Healthy* and *Village of Arlington, supra.*

h. In deciding that the Appellant had the burden of proving that retaliation for the exercise of constitutionally protected rights was the sole motivating factor precipitating her discharge, the Opinion is in direct conflict with the decision of the United States Supreme Court in *Mt. Healthy* and *Village of Arlington, supra.* This error is demonstrated on page two of the Opinion where the Court incorrectly paraphrases an issue allegedly presented by the Appellant:

> "Whether the Trial Court erred in failing to find that the exercise of the right of free speech of plaintiff and her husband was *the* motivating factor in her discharge, and whether the Trial Court erred in placing the burden on plaintiff to show that the exercise of the right of free speech was a motivating factor in her discharge." (Emphasis Added)

Appellant is not required to prove that retaliation against constitutionally protected rights is the only motivating factor in her discharge. Rather, appellant need only prove that such retaliation was *a motivating factor* and, once established, that the burden of proof shifts to the employer to show that she would have been discharged without regard to the retaliatory motive.

WHEREFORE, for each of the above-specified reasons, the Appellant, Patricia McQueeney, by counsel, respectfully requests this Court to accept transfer and to reverse the decision of the Trial Court, and for all other relief in the premises.

YAEGER, FOLEY & CUTTER

By /s/ Donald F. Foley
Donald F. Foley

By /s/ Tony H. Abbott/DFF
Attorneys for Appellant-Plaintiff

## CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was forwarded to John R. Van Winkle, Ging, Free, Brand, Tosick and Van Winkle, 17 East South Street, Greenfield, Indiana 46140, via U.S. First Class Mail, this 11th day of April, 1980.

/s/ Tony H. Abbott/DFF
Tony H. Abbott

YAEGER, FOLEY & CUTTER
620 Union Federal Building
Indianapolis, IN 46204
639-5633

CERTIFICATION

I, Majorie H. O'Laughlin, Clerk of the Supreme Court and Indiana Court of Appeals do hereby certify that the above and foregoing is a full true, complete and correct copy of the original Petition for Transfer and Denial as the same appears upon the record of said court, and in my custody as Clerk.

In testimony Whereof I have hereunto subscribed my name and affixed the Seal of Said Court this 28 day of October, 1980.

/s/ Marjorie H. O'Laughlin, Clerk
By /s/ Carol A. McGowan, Deputy